

NO. 41588-7-II-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHERYL JEAN MARTIN,

Appellant.

11.11.27 10:27
STATE OF WASHINGTON
CLERK OF COURT
JULIA M. HARRIS

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara D. Johnson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The search warrant affidavit failed to establish probable cause, and evidence found during the search should have been suppressed.

2. The court's exclusion of relevant expert testimony on Betrayal Trauma Theory denied appellant her right to present a defense.

3. The trial court improperly excluded evidence necessary to appellant's diminished capacity defense

Issues pertaining to assignments of error

1. Where the search warrant affidavit contained no facts describing a nexus between the crime, the evidence to be sought, and places to be searched, should evidence found in appellant's home and shop have been suppressed?

2. The defense offered testimony and declarations from experts in the field of trauma psychology regarding Betrayal Trauma Theory, in support of appellant's diminished capacity defense. Where the evidence established that the theory is generally accepted in the trauma psychology community and the experts offered testimony based on their observations of human behavior for the purpose of explaining human behavior, did exclusion of that evidence deny appellant her right to present a defense?

3. The defense offered evidence of appellant's relationship with her husband, not to prove he acted in conformity with his character but to support the diagnosis on which her diminished capacity defense was based. Where this evidence was crucial to the jury's assessment of the defense expert's opinion, does the court's exclusion of the evidence require remand for a new trial?

B. STATEMENT OF THE CASE

1. Procedural History

On October 4, 2007, the Clark County Prosecuting Attorney charged appellant Sheryl Martin with attempted first degree murder, or in the alternative first degree assault. CP 7-8; RCW 9A.28.020(1), (3)(c); RCW 9A.32.030(1)(a); RCW 9A.36.011(1). The Honorable Barbara D. Johnson conducted pretrial hearings on CrR 3.5 and 3.6, concluding that Martin's custodial statements were inadmissible but that a search warrant was supported by probable cause. CP 207-18. The court also excluded expert testimony offered by the defense regarding Betrayal Trauma Theory. 401-13. The case proceeded to trial, and the jury entered guilty verdicts. 820-23. The court imposed a low-end standard range sentence, and Martin filed this timely appeal. CP 923, 933.

2. Substantive Facts

In the early morning of September 8, 2007, Sheryl Martin called 911 and reported that she had shot her husband. 20RP 806. She said she was in the house with the gun and her husband was in the camper, but she had no idea where she shot him. 20RP 807-08. When police responded to the call, Martin went outside to the porch, where she was taken into custody and moved to a patrol car. 20RP 819. She was advised of her rights, but the officer made no attempt to determine if she wished to waive them, because he did not plan to question her. 2RP 33; 3RP 142.

When Clark County Sheriff's Deputy Koch transferred Martin to his car, he noticed that her head was drooping forward and she looked "out of it." 2RP 102. He was concerned about her welfare, believing she might have taken medications in an attempt to kill herself. 2RP 102, 110-11; 20RP 864. When he asked Martin about her demeanor, she responded that she had just shot her husband after learning he had been having an affair for two years. 2RP 102; 20RP 870.

Martin was taken to the police precinct, where she was contacted by Clark County Sheriff's Deputy O'Dell. O'Dell asked if she had been advised of her Miranda rights, and Martin asked what that meant. He told her she had probably heard them on TV and proceeded to rattle them off. 2RP 40. When he reached the part about an attorney, Martin asked if this was when an attorney would be provided. 2RP 41. O'Dell made no

attempt to clarify whether she was invoking her right to an attorney, even though Martin had not at any time waived her rights. 2RP 55-56, 58. O'Dell simply responded that she would be appointed an attorney when she went to court on Monday and told Martin he wanted to do a taped interview. 2RP 55, 57-58. Martin became increasingly upset as the interview progressed, crying softly then hysterically, eventually curling up in a ball on the floor. 2RP 61, 83-84. O'Dell decided to take a break at that point. 2RP 62, 84. The trial court found Martin had not made a knowing and intelligent waiver of her rights, and it excluded her statements to police. CP 217.

When police responded to the 911 call, they found Martin's husband, Eddie Martin, in a camper on the property. 20RP 842. He was calling for help, and when police stepped inside the camper, they saw a shotgun wad on the floor. 20RP 842, 855. Mr. Martin had been shot twice in the leg, once in the elbow, and once in the armpit. 20RP 906-07, 939, 941. Emergency medical personnel transported him to the hospital. 20RP 889.

After Martin was taken into custody, officers at the scene decided to do a "protective sweep" of the house to see if anyone else was inside, even though they had no basis to suspect that there was anyone else on the property. 2RP 35-36, 90, 99; 3RP 133, 137-39. Indeed, no one else was

found. The other reason for the search was to locate evidence that could be damaged or destroyed, and in that respect the officers were successful. 2RP 35; 3RP 133. They found a double barreled shotgun and some ammunition in the kitchen and another shotgun next to a box of shells in one of the upstairs bedrooms. 3RP 134.

When Detective O'Mara from the major crimes unit arrived, Koch told him what they had discovered during the warrantless search. 2RP 112-13. O'Mara used that information to prepare a search warrant application, and a warrant was issued to search the house, the camper, a shop and all the vehicles on the property. 2RP 117; CrR 3.5/3.6 Exhibit 1 (Affidavit for Search Warrant, Attached hereto as Appendix A); CrR 3.5/3.6 Exhibit 2 (Search Warrant). In addition to the evidence already discovered in the house, police discovered that there were two spent shells in the 16 gauge shotgun found in the kitchen. 21RP 1016. They also located a live shotgun round and a fired round, a gun case, and a box of 16 gauge shells on the floor of the shop. 21RP 1023-25. Small metal pellets consistent with shotgun shot were found on the floor of the camper. 21RP 1026-27.

Eddie Martin testified at trial that he owned two shotguns: a 16 gauge double barrel and a 12 gauge pump action. 20RP 922. The 16 gauge was kept in the shop, and the 12 gauge was disassembled in a case

in one of the upstairs bedrooms. 20RP 923-24. Neither Eddie Martin nor his wife knew how to load the 12 gauge, but they had both used the 16 gauge on a recent camping trip. 20RP 926-27.

Eddie Martin testified that he and his wife had spent the evening of September 7, 2007, in the shop, drinking and watching TV, and that they smoked a small amount of marijuana. 20RP 919. Around 10:00, Martin went into the house, saying she was not feeling well. 20RP 921. When his wife was inside, Eddie Martin went to his truck to retrieve his cell phone so that he could text the woman he was having an affair with. 20RP 928-29. Martin then returned to the shop, asked about the phone, and wanted to know what he was doing. She became upset and started yelling and throwing things, and he admitted he was having an affair. 20RP 931. Eddie Martin testified that during the ensuing argument he wrestled both a shotgun and a knife from Martin's hands, because he was concerned she was going to hurt herself. 20RP 933-34, 937, 962. Eddie Martin testified that a lot of stuff was said during the confrontation, including talk of divorce. 20RP 935.

Eventually Martin left the shop, and Eddie Martin drank another beer. He did not want to argue anymore, so he went to the camper to sleep. 20RP 936-37. Eddie Martin was not concerned about his safety, although he was concerned that Martin might try to kill herself. He

considered going back to the shop for the 16 gauge shotgun so that she could not hurt herself, but he fell asleep. 20RP 937.

Eddie Martin testified that he was awakened by his wife knocking on the door, so he unlocked it. She reached inside, grabbed a set of keys, and left without saying anything. 20RP 938. The next thing he remembered was waking up and realizing he had been shot twice in the leg. He saw Martin standing in the door of the camper holding the 16 gauge shotgun. 20RP 939. He yelled at her to call 911. Eddie Martin remembered his wife saying, "If I can't have you, nobody can." 20RP 940. She left and then returned to shoot him once in the arm and once in the armpit. 20RP 941.

Shortly after the charges were filed, Martin saw Dr. Laura Brown, a psychologist specializing in trauma, for a mental health evaluation. 21RP 1076. First Brown reviewed the 911 call, police reports from the night of the shooting, and the recorded interview between Martin and Deputy O'Dell. 21RP 1076-77. She then interviewed Martin for about four hours and administered psychological tests. 21RP 1077. Based on this information Brown diagnosed major depression, recurrent; chronic low level depression; and histrionic personality disorder. 21RP 1080.

Brown explained that histrionic personality disorder involves a pathological need to please others and concern with appearances, which

can lead the sufferer to engage in behaviors that are harmful to them. People with this disorder can be driven to do unwise things in relationships, such as put up with mistreatment. 21RP 1081. Histrionic personality is listed in the current version of the Diagnostic and Statistical Manual (DSM IV-TR). 21RP 1082.

Major depression is also defined in the DSM. This type of depression can range from mild to severe. When the person has more than one episode lasting for more than two weeks, the disorder is recurrent. 21RP 1085-86. People with histrionic personality disorder are more at risk of becoming depressed, and the combination of both disorders can leave a person psychologically fragile and prone to difficulty dealing with psycho-social stressors. 21RP 1086-87. Brown explained that a stressor which was not traumatic to most people could be traumatic to someone with this combination of disorders, because such people tend to handle everything less well. 21RP 1088.

Brown defined dissociation as an extreme reaction to stress that results in separation of consciousness, knowledge, and will from behavior, action, and thought. 21RP 1089. A traumatic experience can trigger a one-time dissociative episode, called peri-traumatic dissociation. 21RP 1092. Common symptoms of dissociation include depersonalization, a feeling of being outside one's body; derealization, when perceptions do

not conform with reality; and dissociative amnesia, where a person's memory during the episode is stored elsewhere and sometimes not retrievable. 21RP 1092-93.

In her interview with Martin, Brown asked about Martin's history to get a picture of who she was aside from the pending case. 21RP 1094. Martin said she had never previously been arrested, disciplined at school, or fired from work. 21RP 1095. She had been married for 30 years and had two grown children. She felt the most important job in her life was being married, and she worked hard to be a good wife. She kept difficulties invisible from the rest of the world, because it was important that her marriage, home, and family looked perfect. 21RP 1095-96.

Martin said she had struggled with depression and suicidal thoughts for a number of years, but she had not told anyone. She said she thought about suicide a fair amount and had come up with a plan for carrying it out. 21RP 1096. She had rehearsed reclining on the chaise lounge in the spare bedroom and holding a shotgun to her chin, making sure the shot would go through her brainstem. 21RP 1132.

Martin described her marriage as difficult, saying her husband was unromantic, cruel at times, purposely did things to frighten her, and demanded she did things that made her uncomfortable. 21RP 1097. She said the marriage was volatile at times, but generally her goal was to be

the best wife she could. 21RP 1099. Martin's perception was that she did her best to please her husband, because being married was important to her. She perceived herself as dependent on her husband financially, even though she had a job, and she was particularly fearful that he was having affairs. Yet she described him as her hero. 21RP 1098-99.

In the psychological tests Brown administered, she found some indication of dissociative pathology and suicidal ideation. 21RP 1107-10. Brown found the test results consistent with Martin's presentation in the interview and supportive of her diagnoses of histrionic personality disorder and depression. 21RP 1111-14.

Brown explained that histrionic personality disorder and dissociative symptomology are linked in that the disorder can contribute to a vulnerability to dissociate at times of stress. 21RP 1121-22. Brown concluded that Martin experienced a dissociative episode before the shooting, through an interaction of her personality disorder, her depression, and the psycho-social stressors she experienced that night. 21RP 1125-26.

Martin told Brown that on the night of the shooting, she and her husband had been in the shop drinking, smoking a little marijuana, and playing darts. 21RP 1128. She went into the house to go to bed, but when she looked out the window, she saw her husband talking on his cell phone.

Martin became suspicious that he was having an affair, so she went back to the shop and pushed him to tell her who he was talking to. 21RP 1128. He eventually admitted the affair, and Martin became angry. She started throwing things around the shop and grabbed a knife and waved it. Her husband grabbed the knife away from her and dragged her out of the shop. 21RP 1128-29.

Martin was feeling humiliated and suicidal, and she went back in the house determined to kill herself. 21RP 1130-31. Brown described this as a histrionic reaction. 21RP 1130. Although Martin was not in a dissociative state during the fight, she began to experience dissociative symptoms when she went into the house. 21RP 1130-31. She started feeling as if she were watching her body do things. She saw herself hunt for the 12 gauge shotgun and try to load it. She heard a voice telling her to change out of her night clothes so that when her body was found she would be properly dressed. 21RP 1131. Martin described feeling a sense of wondering why she could not load the gun. 21RP 1133.

Her sense of recall became spotty at that point. She remembered going downstairs into the shop because the 16 gauge shotgun was there. She recalled loading two shells, still determined to kill herself. Then she had a flare up of wanting her husband to explain why he was throwing her away before she killed herself, so she went to the camper to ask him.

21RP 1134. She was still in a vague state, not entirely herself but not completely separated from self yet. 21RP 1135.

Martin did not recount going to the camper before having the gun. She remembered getting to the camper, knocking on the door, walking up the steps to the doorway, and holding the gun. 21RP 1136-37. That was all she remembered until she heard her husband screaming that she had shot him and to call 911. She had no recollection of firing the gun or of returning to the shop to reload it. 21RP 1137. Brown tried every tool available to get Martin to remember what happened, but she was unsuccessful. Brown explained that Martin's inability to recall behaviors after gradually going into a dissociative state indicates she was fully dissociative at the time she fired the gun. 21RP 1137-38.

Brown did not believe that Martin's statements in the 911 call and to Deputy Koch that she had shot her husband were inconsistent with her inability to remember the shooting. 21RP 1151. Martin knew she had shot her husband because he yelled at her to call 911, saying she had shot him. Brown explained that Martin knew she had shot her husband, even though she did not recall doing so. 21RP 1151.

Brown testified that Martin's personality disorder left her pathologically terrified of abandonment, because her goal is to be liked and stay connected. With her depression on top of that, she was more

vulnerable. Being told that her marriage of 30 years was ending was an intolerable stressor, which caused her consciousness and will to separate from her behavior. 21RP 1126-27. Brown testified to a reasonable psychological certainty that Martin was in a dissociative state at the time of the shooting. 21RP 1127.

Brown further testified that when Martin went into a dissociative state, she could not form the intent to kill her husband or cause injury, because her consciousness, will and thought were separated from her behavior. The ability to form intent was absent and the behavior occurred without consciousness, will or intent. 21RP 1140. Brown's opinion, based on a reasonable psychological certainty, was that due to this dissociative state, Martin was not able to form the intent to commit great bodily harm or the intent to commit murder. 21RP 1142.

The State's expert, Dr. Marilyn Ronnei, a forensic clinical psychologist at Western State Hospital, conducted a diminished capacity evaluation. 22RP 1185-86, 1192. Like Brown she reviewed police and witness reports from the night of the shooting and conducted a four-hour interview with Martin, although she did not administer any psychological tests. 22RP 1192-94, 1200. She diagnosed recurrent major depressive disorder and post traumatic stress disorder. 22RP 1203. Ronnei believed

the trauma that initiated Martin's PTSD was shooting her husband. 22RP 1204.

Martin's description of the events on the night of the shooting was consistent with what she told Brown. 22RP 1205-09. She described deciding to kill herself after her husband told her about the affair and that he wanted a divorce. 22RP 1207. She found the gun upstairs but could not load it. She remembered there was a gun in the shop, and she changed her clothes so that after she killed herself she would not be found in her pajamas. 22RP 1208. She recalled going to the shop, loading the gun, going to the camper, and raising the gun. She believed she fired twice. 22RP 1209. She did not recall going back to the shop and reloading the gun. 22RP 1211. Then next thing she remembered was hearing screaming, and her husband told her to call 911. 22RP 1209.

Like Brown, Ronnei saw evidence that Martin experienced some dissociation around the time of the shooting. 22RP 1225. She described dissociation as when a person feels detached from reality or from themselves, but they know who they are and what is going on. 22RP 1200. Ronnei testified, however, that she did not believe Martin's dissociation diminished her capacity to form the necessary intent. 22RP 1226. Her opinion was that Martin had the capacity to act intentionally, because she acted in an organized, goal-directed way. 22RP 1217-18.

Brown disagreed with Ronnei's definition of dissociation and her conclusion as to the nature of Martin's dissociative state. 22RP 1243. Ronnei described depersonalization, which is only one type of dissociative experience. 22RP 1243. Brown's assessment of Martin's dissociative episode was that it was a full on separation of consciousness, mind and will from action, and in that state Martin did not have the capacity to form the intent to engage in any of the activities she engaged in. 22RP 1244.

C. ARGUMENT

1. THE SEARCH WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH THE HOUSE OR THE SHOP, AND EVIDENCE DISCOVERED PURSUANT TO THE WARRANT SHOULD HAVE BEEN SUPPRESSED.

It is well-established that the warrant clauses of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington constitution require that a search warrant issue only on a determination of probable cause. State v. Fry, 168 Wn.2d 1, 5-6, 228 P.3d 1 (2010) (citing State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). Probable cause is established if the warrant affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d

133, 140, 977 P.2d 582 (1999)). Thus, “probable cause requires a nexus between [1] criminal activity and the item to be seized, and also [2] a nexus between the item to be seized and the place to be searched.” State v. Goble, 88 Wn.App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996)).

In general, a magistrate’s decision to issue a warrant is given great deference. Maddox, 152 Wn.2d at 509; State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A trial court’s conclusion that the affidavit establishes probable cause is reviewed de novo, however. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Review is limited to “the four corners” of the affidavit. Neth, 165 Wn.2d at 182. The only information the reviewing court may consider is the information before the issuing magistrate. Id.

The warrant affidavit in this case stated Detective O’Mara had reason to believe that a 28 gauge shotgun, spent and live shotgun shells, an additional shotgun, and other evidence of the crime of first degree assault would be found on the property. Appendix A. In support of this belief, O’Mara stated that he had been informed by Deputy Koch that Martin had called 911 and reported that she had just shot her husband; responding units took Martin into custody; Martin’s husband, Eddie Martin, was found inside a camper attached to a pickup truck parked in front of a shop;

a shotgun was and a piece of buckshot were found inside the camper; Eddie Martin said his wife had shot him; Eddie Martin appeared to have been shot in the right shin and left elbow; a search for additional people on the scene revealed a shotgun in the kitchen of the main residence with two live shotgun shells next to it; another shotgun was found upstairs with a box of shells next to it; and Martin had told Koch she just shot her husband. Appendix A.

The trial court ruled that the initial warrantless search of Martin's house was unlawful. CP 210. The proper procedure for a reviewing court when police have used unconstitutional means to gather some of the information included in the warrant affidavit is to determine whether the remaining untainted facts provide probable cause to issue the warrant. State v. Ross, 141 Wn.2d 304, 314-15, 4 P.3d 130 (2000); State v. Johnson, 75 Wn.App. 692, 709-10, 879 P.2d 984 (1994), review denied 126 Wn.2d 1004 (1995). Accordingly, the court struck the request to search for a specific shotgun and the reference to a second shotgun, as well as the paragraph describing the warrantless search. CP 210-11.

The court nonetheless found probable cause to search the house and the shop, stating that 911 dispatch had said a woman called and reported shooting her husband, the husband was found and he had been shot, and it did not take a lot of analysis, since Martin was coming out of

the house when police arrived, to determine there may be a gun somewhere. 9RP 270; CP 211. The warrant affidavit says nothing about Martin being in the house when the officers arrived or being arrested on the porch, however. The court was apparently relying on facts established at the suppression hearing. As discussed above, proper review of the probable cause determination is limited to the four corners of the affidavit. See Neth, 165 Wn.2d at 182

With the illegally obtained information excised, the warrant affidavit contains no information connecting the suspected criminal activity or the items to be sought with the house or the shop. “[A]n affidavit in support of a search warrant must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched.” Neth, 165 Wn.2d at 183. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” Thein, 138 Wn.2d at 147.

In Thein, police obtained a warrant to search the defendant’s residence after discovering evidence at another house linking the defendant to marijuana sales. Thein, 138 Wn.2d at 136. Although the police had sufficient information to believe the defendant was involved in growing and distributing the marijuana, their belief that evidence of that

activity would be found at his residence was based solely on the generalized assumption that drug dealers store at least a portion of their inventory and paraphernalia at their residences. Id. at 138-39. Police had no independent information to confirm their suspicion that the defendant was dealing drugs from his home, such as observations of him leaving the residence with packages, sealed windows, power records, or other suspicious activity at that address. Id. at 150.

The trial court and Court of Appeals upheld the warrant, but the Supreme Court reversed. It held that the generalized statements regarding the habits of drug dealers were insufficient to establish probable cause to search the defendant's home. Id. at 148. Probable cause requires more than blanket inferences substituting generalities for specific facts linking the criminal activity with the place to be searched. Id. at 147-48.

Similarly, in this case, the affidavit contains no specific facts linking the criminal activity or the evidence sought with the places to be searched. In fact, the affidavit describes a nexus between the evidence to be sought and the home only when information from the unlawful warrantless search is considered. Once that material is excised, no connection is shown between the shooting in the camper, the weapon, and the home or the shop.

Because the redacted affidavit contained no facts establishing a reason to believe evidence would be found in either the house or the shop, the warrant allowed the police to conduct a general, exploratory search for evidence of the crime. Such searches are “unreasonable, unauthorized, and invalid.” Thein, 138 Wn.2d at 149. The search warrant was not supported by probable cause, and all evidence discovered in the search of the house and the shop should have been suppressed. See Thein, 138 Wn.2d at 150.

2. THE IMPROPER EXCLUSION OF RELEVANT
EXPERT TESTIMONY REGARDING BETRAYAL
TRAUMA THEORY SIGNIFICANTLY IMPAIRED
MARTIN’S RIGHT TO PRESENT A DEFENSE.

Prior to trial, the State sought to exclude evidence regarding Betrayal Trauma Theory under Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923). The State argued that the theory had not been generally accepted in the psychological community as a whole and thus it did not meet the threshold for admissibility. 15RP 318. The Court held a hearing to determine the admissibility of that theory, and both parties submitted exhibits in support of their positions. Frye Exhibits 1-42, 44-46, 48-51, 57-63.

The defense offered testimony from Dr. Jennifer Freyd, the psychology professor and researcher who first developed Betrayal Trauma

Theory. 15RP 326. Freyd has been elected a Fellow at a number of organizations in her field including the International Society for the Study of Trauma Dissociation and the American Psychological Association. 15RP 327-28. She has also received numerous awards for her work. 15RP 327. She was the editor of the *Journal of Trauma and Dissociation*, where it was her job to select articles for publication and decide how they should be peer reviewed. 15RP 330-31. That journal is published internationally. 15RP 336.

Freyd has published both books and articles on her research in the field of trauma psychology. Her articles relating to Betrayal Trauma Theory have been validated through peer review. 15RP 333-34. She is also frequently invited to write articles in her field. 15RP 339. Freyd has given numerous presentations at the American Psychological Association's annual conferences, and she receives more invitations to speak at various conferences than she can accept, both nationally and internationally. 15RP 340, 343.

In 1996 Freyd published her first book on betrayal trauma, and that book has gone through several printings. 15RP 341. In addition, a measurement instrument she and her associates created has been extensively used by researchers all over the world. 15RP 346-47. She has used that instrument to assess betrayal traumas relating to physical,

emotional and sexual abuses occurring in adulthood and childhood. 15RP 378. She and her associates have tested thousands of participants using that tool, and a National Institute of Health study applied it to 20,000 people. 15RP 379.

Freyd testified that, at its inception, Betrayal Trauma Theory was developed to explain repressed memories and delayed recall of traumatic events, such as childhood sexual abuse. 15RP 349. The theory explains that when someone is mistreated by someone on whom that person is dependent, it is to the victim's survival advantage to suppress the awareness of the betrayal in order to maintain the attachment bond with the perpetrator. This suppression commonly takes the form of dissociation. 15RP 353.

After developing this theory, Freyd started a program of empirical research to test it. She explored both the relationship between betrayal and forgetting, and the mental mechanisms that underlie the forgetting. 15RP 354-55. Freyd analyzed information regarding trauma history and memory from five different datasets for her book published in 1996. She looked at the particular variable of whether the abuser was somebody the victim had depended upon and tested her hypothesis that memory would be worse in such cases. 15RP 355-56. She found that dissociation rates

were higher among people abused by family members than non-family members. 15RP 357.

In 2001 Freyd published a study based on new data collected from undergraduate students about their trauma history and memory. Since then most of the data on that question has come from other researchers and other laboratories. 15RP 357.

In the past few years Freyd has gone beyond the initial question of how betrayal trauma affects memory to a more general question of how betrayal trauma affects overall functioning, because her research had revealed that betrayal trauma has a wide range of negative impacts. 15RP 357-58. She found that betrayal trauma led to not just memory loss but further dissociation, depression, and physical illness. 15RP 358.

Freyd explained that Betrayal Trauma Theory does not apply just to repressed memory of childhood sexual abuse, although that issue has garnered the most media attention. 15RP 377. Early in her research, she saw the connection between betrayal trauma and a broader set of negative reactions, which applies in adult relationships as well. 15RP 378. She has done studies involving adults and married couples, assessing exposure to betrayal trauma in both childhood and adulthood. 15RP 380. One particular study focused on adults who discovered there had been infidelity in their marriages. 15RP 381. Domestic violence is another

example of betrayal trauma in the context of a marriage. 16RP 542. Freyd made it clear that sexual abuse is just one example of betrayal trauma. 15RP 405.

Freyd is an educator and a researcher, rather than a clinical psychologist. She does not diagnose or treat patients. Rather, she assesses people for their functioning, state of mind, and history in the context of research. 15RP 383. In that context, Freyd reviewed Martin's interview with Dr. Ronnei, listening to the recording as well as reading the transcript. She applied the principles and tools of Betrayal Trauma Theory, listening for indications as to the nature of Martin's relationship with her husband and Martin's state of mind on the night of the shooting. 15RP 382-83. She also reviewed the police reports and statements Martin made to the officers who interviewed her. 15RP 383.

Freyd concluded that Martin showed reactions consistent with having suffered betrayal trauma at the time of the shooting. She found numerous descriptions by Martin of marital relations that fit the definition of betrayal trauma. 15RP 385-86. Freyd noted that Martin had described being subjected to many years of mistreatment. She explained that betrayal trauma theory helps explain how people can block their awareness of mistreatment in order to remain in a relationship they perceive as necessary. 15RP 391. On the night of the shooting, Martin

displayed the signs and symptoms of a dissociative episode triggered by betrayal trauma. 15RP 404.

Freyd explained that Betrayal Trauma Theory is not a diagnosis but rather an experience, and it is therefore not referenced in the Diagnostic and Statistical Manual published by the American Psychiatric Association. 15RP 409, 418. The theory helped explain Martin's experiences on the night of the shooting. 15RP 404.

Dr. Laura Brown also testified for the defense. She is a clinical psychologist in practice since 1979. She was elected to fellow status in the APA in 1986 and has been involved in the governance of that organization. She was currently the president of the Trauma Psychology division of the APA. 16RP 567-69. Brown's practice is primarily psychotherapy with individuals with a trauma history, and she has also done forensic evaluations in cases involving trauma or abuse. 16RP 576. She has given opinions related to Betrayal Trauma Theory and had recently given deposition testimony on the theory in two or three cases. 16RP 578.

Brown testified that she first heard about Betrayal Trauma Theory in 1994 as a member of the APA working group on recovered memories of abuse. She found that the theory provided a framework for understanding things she had observed clinically for a long time. 16RP 578-79. Since

then she has applied the theory in her practice and found it very useful in explaining behavior. 16RP 579. At conventions and meetings of trauma organizations, Brown has encountered a number of people who find that Betrayal Trauma Theory helps them understand what they are seeing clinically. 16RP 581.

Since first encountering Freyd's paper describing Betrayal Trauma Theory, Brown has continued to read the research related to the theory, as well as critiques of the theory. 16RP 582. Freyd is not the only scholar to submit articles on betrayal trauma for peer review. 15RP 341. She and other researchers around the world have tested the validity of betrayal trauma theory and published results in peer reviewed journals. 15RP 359. Her findings have been criticized, and she has responded to those criticisms in published articles. 15RP 367, 411.

Brown testified that the construct of Betrayal Trauma Theory is pretty well integrated into the work of most of the people with whom she interacts. They cite it in their writings and refer to it in their presentations. 16RP 583. In a Google Scholar search, Brown found 500 citations to Freyd's work. She also found that Freyd is regularly invited to speak by various organizations in the field, indicating others have found her work to be of high value. 16RP 585. Brown testified it was her opinion that

Betrayal Trauma Theory is generally accepted in the relevant psychological community. 16RP 590.

Brown testified that she considered betrayal trauma as part of her forensic evaluation of Martin. 16RP 593. Based on her review of the records, her interview with Martin, and the results of Martin's psychological testing, Brown found ample evidence of a dissociative episode just preceding and for several hours after the shooting. Using Betrayal Trauma Theory to analyze Martin's behavior, Brown determined that Martin experienced learning of her husband's infidelity and desire to end the marriage as trauma, which led to the dissociative state. 16RP 593-95. In her opinion, it was the dissociation which impaired Martin's ability to form intent, and Betrayal Trauma Theory was the scientific construct which explained why the dissociation occurred. 16RP 620-22.

The defense further offered declarations from four experts in the field of trauma and dissociation, stating that Betrayal Trauma Theory is generally accepted in that scientific community. 16RP 617-19. Frye Exhibits 48-51. The court declined to admit these declarations, however, noting that they made general references to the concept of Betrayal Trauma Theory and were not subject to cross examination. 16RP 627-28.

The State presented evidence from two psychologists in opposition to the proposed testimony on Betrayal Trauma Theory. First, Dr. Marilyn

Ronnei, a clinical psychologist who performs forensic evaluations at Western State Hospital, testified that she was aware there was a trauma psychology division of the APA, but she knew nothing about it, nor had she done any continuing education regarding peri-traumatic dissociation. 15RP 437-38.

Ronnei did not consider herself an expert in the field of trauma psychology, nor did she feel comfortable making sweeping statements about whether Betrayal Trauma Theory is generally accepted in the psychological community. 15RP 454-55. Nonetheless, Ronnei testified that Betrayal Trauma Theory had not been presented as part of a defense strategy on any cases she had worked on, and none of the colleagues she questioned had seen the theory used. 15RP 450-51. She noted that she found 50 to 75 articles about the theory in a Google search, but she did not read them. 15RP 452. And she did not speak to anyone in the APA trauma division to find out about Betrayal Trauma Theory. 15RP 467.

Next, Dr. Richard Packard, a licensed psychologist and sex offender treatment provider, was asked whether Betrayal Trauma Theory was generally accepted in the psychological community. 15RP 475, 484. Packard testified that he had not heard of the theory before being contacted for this case, but his search of a psychological database turned up 60 to 70 hits. 15RP 487-88. After eliminating articles he did not feel

were relevant and articles written by Freyd or anyone ever associated with her, he found nine articles remaining, seven of which he considered to present new empirical findings. Packard felt that six of those seven articles were not supportive of the theory. 15RP 490-92. Packard testified that he also informally polled members of the Washington Psychology Law Society and found that 19 of the 20 forensic evaluators he spoke to had not heard of Betrayal Trauma Theory. 15RP 502. Based on this information, Packard did not believe that the theory is generally accepted in the psychological community. 15RP 506.

Freyd responded that Packard's search did not comprise all the published peer reviewed articles on Betrayal Trauma Theory, excluding articles from Science Magazine, the Journal of Behavioral Theory and Experimental Psychiatry, and Current Directions in Psychological Science, all of which reached conclusions consistent with Betrayal Trauma Theory. 16RP 549-50. She testified that most of the articles she was aware of supported the theory. 16RP 555. Freyd explained that psychology is a very big field and that work being done in cognitive psychology is not generally known about in social psychology. 16RP 561.

The defense position was that admissibility of Freyd's testimony and Brown's reliance on Betrayal Trauma Theory was governed by ER 702, not Frye, because it was relevant evidence offered by qualified

witnesses based on their experience and observations about human behavior for the purpose of explaining that behavior. 15RP 315. In any event, the evidence showed that Betrayal Trauma Theory is generally accepted in the relevant scientific community of trauma psychology. In response to the court's question about application of the theory in a case not involving child sexual abuse, counsel reminded the court that Freyd had testified that the constructs of Betrayal Trauma Theory are the same across the spectrum from child to adult and that the theory is not limited to childhood abuse. 16RP 633-35.

The court excluded all evidence of Betrayal Trauma Theory. CP 412. First, the court stated that Betrayal Trauma Theory is a theory developed to explain recovered memories of childhood sexual abuse, which the court described as a controversial subject. CP 407. The court concluded that Betrayal Trauma Theory "is an interesting theory, discussed within the field of trauma psychology, difficult to study with scientific certainty, which is helpful in a therapeutic setting, but is not yet generally accepted in the scientific community." CP 410. The court noted that if this case involved the delayed reporting of childhood sexual abuse, Betrayal Trauma Theory would be relevant and potentially helpful to the jury. CP 411.

The Court went on to say that even if Betrayal Trauma Theory met the standard for admissibility as to delayed reporting of childhood sexual abuse, it has not been established as a theory relevant to adult domestic violence. CP 410. Although Freyd testified that her theories and research regarding betrayal trauma are relevant to the circumstances of this case, the court did not believe the articles in evidence demonstrated any research into adult domestic violence. CP 410. While the court noted that it had found references to research on the subject of domestic violence in the context of betrayal trauma, the court did not believe that Betrayal Trauma Theory had been widely studied in this context. CP 412.

The court concluded that “evidence of Betrayal Trauma and Betrayal Trauma Theory does not meet the tests for admissibility into evidence under ER 702, ER 401, or ER 402 in this case, involving adult domestic violence. Evidence of BTT as a scientific theory or the basis of diagnosis or conclusions will not be admitted in this case.” CP 412.

The admissibility of scientific evidence is determined under a two-part inquiry. First, the proposed evidence must meet the standard for admissibility under Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923). Second, the testimony must be admissible under ER 702. State v. Greene, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). The court below ruled that evidence of Betrayal Trauma Theory did not meet either

standard. This Court reviews admissibility under Frye *de novo*, and admissibility under ER 702 for abuse of discretion. Greene, 139 Wn.2d at 70.

Under Frye, novel scientific evidence is admissible if (1) the theory is generally accepted in the scientific community of which it is a part and (2) there are generally accepted methods of applying the theory capable of producing reliable results. Greene, 139 Wn.2d at 70 (citing State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994)). Unanimous acceptance by experts in the field is not required, however. State v. Copeland, 130 Wn.2d 244, 270, 922 P.2d 1304 (1996).

The American Psychological Association has a division devoted to the field of trauma psychology. Division 56 Trauma Psychology, <http://www.apatraumadivision.org/>. Dr. Brown, president of the APA Trauma Psychology division, testified that the field of trauma psychology is well developed, and the Trauma Psychology division was formed about five years ago as a means of devoting programming hours to the field at the APA annual conventions. 16RP 574. Brown explained that about 47 percent of APA members belong to a division. The smallest divisions have about 600 members, while the largest have 4000 members. The trauma psychology division is mid-sized, with about 1400 members.

16RP 575; see also Division 56 Trauma Psychology, <http://www.apatraumadivision.org/>.

Betrayal Trauma Theory explains patterns of behavior of individuals affected by a particular type of trauma. Brown testified that since the theory was first described by Freyd in 1991, it has gained general acceptance in the field of trauma psychology. 16RP 590. She and most of the practitioners she encounters in the field of trauma psychology have integrated the theory into their work. 16RP 581-83. Four other highly regarded experts in the field have also submitted declarations giving their opinion that Betrayal Trauma Theory is generally accepted in the field of trauma psychology. Frye Exhibits 48-51. This Court may consider these declarations, even though the trial court did not, because an appellate court's review of the Frye determination may extend beyond the record. See Copeland, 130 Wn.2d at 255-256.

While there have been some published criticisms of Dr. Freyd's research, unanimous acceptance of a theory is not required for admissibility under Frye. See Copeland, 130 Wn.2d at 270. Nor is general acceptance within the entire psychological community required. As Freyd explained, psychology is a very big field, and work being done in the area of cognitive psychology is not generally known about in all other areas of the field. 16RP 561. To be admissible under Frye, a theory

need only be generally accepted within the scientific community of which it is a part. Greene, 139 Wn.2d at 70. The relevant scientific community in this case is the trauma psychology community, and the evidence shows that Betrayal Trauma Theory is generally accepted in that community.

In excluding evidence of Betrayal Trauma Theory, the court below stated that while the theory would be relevant to explain delayed reporting of childhood sexual abuse, it did not believe there was a general consensus that the theory applied in the context of adult domestic violence. CP 412. It appears that the court was confusing general acceptance of the theory with its forensic application in this case. The Supreme Court rejected a similar analysis in Greene.

In Greene, the trial court excluded evidence of Dissociative Identity Disorder, concluding there was no scientific consensus whether a person suffering from that condition would be considered legally insane. Greene, 139 Wn.2d at 71. The Court of Appeals held that the proper question under Frye was whether DID was a generally accepted mental disorder. The relationship between that disorder and an insanity or diminished capacity defense was a legal question addressed under ER 702. Id. The Supreme Court agreed, holding that the Frye inquiry focused solely on general consensus within the appropriate scientific community, not on forensic application of the scientific theory in a particular case. Id.

Here, under Frye, the question is whether Betrayal Trauma Theory is generally accepted in the relevant scientific community. In contrast, whether that theory can be applied to establish diminished capacity under the facts of this case is analyzed under ER 702.

In this case, the trial court's determination that Betrayal Trauma theory was not admissible stemmed from its characterization of the theory as a means to explain recovered memories of childhood sexual abuse. CP 407. Freyd testified, however, that while initial research focused on that question, Betrayal Trauma Theory explains the reactions of a person who is mistreated by someone on whom he or she is dependent, and the theory applies to exposure to betrayal trauma in adult relationships as well. 15RP 353, 378. Because Betrayal Trauma Theory is generally accepted in the relevant scientific community, application of that theory to the facts of this case is a matter of weight and admissibility under ER 702. State v. Gregory, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006).

Under ER 702, a qualified expert may testify as to "scientific, technical, or other specialized knowledge" if the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony is helpful if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), review denied,

154 Wn.2d 1026 (2005); State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999).

Washington courts have recognized that expert testimony generally describing symptoms exhibited by trauma victims may be admissible under ER 702 when relevant and when not offered as a direct comment on the victim's credibility. Carlton v. Vancouver Care LLC, 155 Wn. App. 151, 164, 231 P.3d 1241 (2010). For example, while Rape Trauma Syndrome is not admissible to prove that a rape occurred, evidence of that theory has been admitted under ER 702 to explain the trauma process. See State v. Black, 109 Wn.2d 336, 342, 745 P.2d 12 (1987) (use of rape trauma syndrome to prove rape occurred unfairly prejudicial because it expressed opinion as to guilt); Carlton, 155 Wn. App. at 163, 231 P.3d 1241 (2010) (rape trauma syndrome helpful to explain manner in which victim reacts to rape). See also State v. Stevens, 58 Wn. App. 478, 496, 794 P.2d 38 (symptoms associated with sexual abuse), review denied, 115 Wn.2d 1025 (1990); State v. Ciskie, 110 Wn.2d 263, 279-80, 751 P.2d 1165 (1988) (Battered Woman Syndrome); State v. Madison, 53 Wn. App. 754, 764, 770 P.2d 662 (recantation phenomenon offered to explain why child victim of sexual abuse recanted), review denied, 113 Wn.2d 1002 (1989).

Similarly, Betrayal Trauma Theory is relevant and helpful to the jury in this case. Freyd testified that empirical research shows that any trauma involving being betrayed by someone on whom the victim is dependent will evoke the same negative reactions, including dissociation, depression, and physical illness. 15RP 377-79. This pattern of response is beyond the knowledge of the average lay juror. Freyd's offered testimony would explain that Martin showed characteristics consistent with Betrayal Trauma Theory, and as a result, she experienced a dissociative episode around the time she shot her husband. 15RP 404. Brown would explain that because of Martin's personality disorder, depression, and the history of her relationship with her husband, she experienced learning of his infidelity as betrayal trauma, and Betrayal Trauma Theory explained her dissociative episode. 16RP 593-95. This expert testimony would describe the general reactions to betrayal trauma, providing context for the jury's decision as to Martin's capacity to form intent.

The trial court's concerns that Betrayal Trauma Theory did not apply to reactions within an adult relationship go to the weight of the evidence, rather than its admissibility. Betrayal Trauma Theory was relevant because Brown testified that it explained why Martin experienced dissociation upon learning of her husband's infidelity and desire to end the marriage. 16RP 593-95, 620-22. Her application of the theory was

supported by Freyd's testimony that she had done studies involving adults and married couples, including studies focusing on domestic violence and the discovery of infidelity as betrayal trauma. Freyd's research showed a connection between betrayal trauma and negative reactions in adult relationships. 15RP 378, 380-81.

Whether a scientific theory has been applied correctly in a particular instance goes to its weight, not admissibility. Gregory, 158 Wn.2d at 830. The State was free to cross examine Freyd and Brown as to their application of Betrayal Trauma Theory to the facts of this case and to present experts to rebut their testimony. "Any differences in opinion between experts go to the weight and not to the admissibility of such testimony." Carlton, 155 Wn. App. at 169.

Finally, expert testimony about Betrayal Trauma Theory should have been admitted in this case without application of the Frye standard. "'Frye is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation about human behavior for the purpose of explaining that behavior.'" In re Detention of Berry, 160 Wn. App. 374, 395, n.15, 248 P.3d 592 (2011) (quoting Logerquist v. McVey, 196 Ariz. 470, 1 P.3d 113, 123 (2000)).

Here, Freyd offered testimony about her extensive observations of betrayal trauma, including trauma resulting from infidelity and domestic

violence in the context of a marriage. She applied her experiences and observations to explain Martin's behavior on the night of the shooting. Brown too offered testimony based on her experiences in her clinical practice to explain Martin's reactions. Admissibility of this expert testimony for the purpose of proving that Martin's behavior was attributable to the betrayal trauma she experienced is subject only to the requirements of ER 702. See Carlton, 155 Wn. App. at 167 (admissibility of Rape Trauma Syndrome in civil case); Stevens, 58 Wn. App. at 496-97 (expert testimony describing symptoms generally exhibited by victims admissible when relevant and not offered as direct comment on victim's credibility; declining to undertake Frye analysis). The offered testimony on Betrayal Trauma Theory by qualified experts would have assisted the jury in evaluating Martin's diminished capacity defense, and it therefore should have been admitted under ER 702.

Both the state and federal constitutions guarantee a criminal defendant "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d

808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). The court's improper exclusion of relevant expert testimony substantially impaired Martin's ability to present a complete diminished capacity defense, and the case should be remanded for a new trial.

3. THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE NECESSARY TO MARTIN'S DIMINISHED CAPACITY DEFENSE.

Martin raised a defense of diminished capacity, which required her to produce expert testimony demonstrating that a mental disorder impaired her ability to form the culpable mental state to commit the charged offense. See State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Dr. Brown testified at trial that she diagnosed Martin with histrionic personality disorder. 21RP 1080. She described people with this disorder as pathologically people-pleasing, concerned with appearances, driven to engage in behavior that is not good for them, and prone to put up with mistreatment in relationships. 21RP 1081. Brown's diagnosis was based in significant part on Martin's description of her marriage. Brown concluded that Martin's perceptions of the relationship and her reasons for staying in it were evidence of histrionic personality disorder. 21RP 1114-21.

Martin described her perceptions of her marriage in her psychological evaluations. She reported to Ronnei that her husband was physically abusive at points in their marriage, and early in their relationship he often slapped the back of her head and kicked at her. Martin felt her husband believed it was her duty to have sex with him whether she wanted to or not. CP 158. Later in the marriage he was emotionally abusive. She felt she had to be perfect, because he told her he would divorce her if she got fat, belittled her, and humiliated her. CP 158. Martin described an incident when they were snowmobiling 150 miles into the wilderness, and her husband joked about leaving her there. Martin said she felt vulnerable in the marriage and unable to manage on her own, and her husband told her he would take everything if he left. CP 158.

Martin described similar feelings to Brown. She described the relationship as volatile, with frequent arguments in which she would throw things and he would physically restrain her. She reported intermittent episodes of violence when her husband would come home drunk, and he jokingly threatened her with a tire iron on occasion. Martin reported many instances of emotional abuse, including verbal degradation, and recently he had begun telling her that the only way out of the marriage was a murder-suicide. Frye Exhibit 33, at 4-5. Martin described herself as subservient and compliant, saying she obeyed her husband because he

made more money than she did. She thought it was her job to please him and make him happy. Frye Exhibit 33, at 5.

Martin reported that in the month before the shooting she began to suspect that her husband was hiding something from her. He was furtive about phone calls and confrontational when she asked who he was talking to. During one incident he called her a bitch and threw a beer bottle at her, then trying to push her out of his shop. Frye Exhibit 33, at 6.

Prior to trial, the State moved to exclude evidence about the relationship between Martin and her husband, including specific instances of conduct. 18RP 709; 19RP 732. The State argued that the evidence was prejudicial to the State because it would portray Martin as a person who had been abused by her husband for many years, developed mental health problems, and resulted in diminished capacity on the night of the shooting. 18RP 709-10. The State characterized the evidence as attacking the character of the victim, arguing it was improper. 19RP 733.

Defense counsel argued that evidence of the Martins' relationship was not being offered to prove the husband's character but to support the diminished capacity defense. Since Brown considered the history of Martin's relationship with her husband in diagnosing a histrionic personality disorder, that history was relevant in placing the events which triggered her dissociative episode before the shooting into context. 18RP

719-20. Unless the jury understood the basis for that diagnosis, it would not understand how learning of her husband's infidelity could have triggered Martin's dissociative episode. 19RP 739, 742. The jury could not assess the credibility of Brown's opinion without evidence of the Martins' relationship. 19RP 740, 743.

The court first noted that the character of the victim and prior misconduct are generally inadmissible. 19RP 736-37. Thus the defense has the burden of showing that the character of the victim and the history of the relationship are relevant. 19RP 737. The court ruled that general references to the nature of relationship would be relevant to Martin's mental state, allowing the defense to present evidence that the marriage was volatile and Martin was unhappy and felt emotionally isolated. 19RP 744-45. It excluded any details about particular activities or conduct of the husband prior to the night of the shooting, however, finding such details were character and other acts evidence which were inadmissible because Martin was not raising a claim of self defense. 19RP 745-46.

Pursuant to the court's ruling, Brown did not describe the specific statements and incidents she relied on in reaching her diagnosis, as detailed in her report. Instead, she testified only that Martin reported that her marriage was difficult and volatile, her husband was unromantic and cruel at times, that he deliberately frightened her and made her

uncomfortable, while she did her best to give him what he wanted. 21RP 1097-99.

While the trial court has discretion to determine what evidence is admitted, the court's decision will be reversed if it is manifestly unreasonable or based on untenable grounds or untenable reasons. State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996). As the trial court noted, the general rule is that character evidence is inadmissible to prove action in conformity therewith. ER 404(a). The court failed to recognize that evidence of the relationship between Martin and her husband was not offered to prove the husband's character or anything about his conduct on the night of the shooting, however. The offered evidence was relevant to explain Martin's conduct and support her diminished capacity defense, and therefore was admissible under ER 404(b). See Grant, 83 Wn. App. at 108-09.

In Grant, the Court of Appeals held that evidence of the defendant's prior assaults on his wife were admissible under ER 404(b) to explain the wife's behavior, which might appear inconsistent with her testimony. Grant, 83 Wn. App. at 106-07. The prior assaults were relevant for their effect on the wife's behavior, not to prove that the husband acted in conformity with those prior acts. "The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a

relationship marked by domestic violence and the effect such a relationship has on the victim.” Grant, 83 Wn. App. at 108. The Court of Appeals recognized that “Expert testimony would have shown that the consequences of domestic violence often lead to seemingly inconsistent conduct on the part of the victim. In the present case, the history of domestic violence and expert testimony explaining Ms. Grant's otherwise seemingly inconsistent statements and conduct could properly have been admitted under ER 404(b)[.]” Grant, 83 Wn. App. at 109; see also State v. Lopez, 142 Wn. App. 341, 355, 174 P.3d 1216 (2007) (Where defendant was charged with felony harassment, evidence of his criminal connections was properly admitted under ER 404(b) because it was relevant to show the victim’s state of mind and the context of their relationship and not offered to prove criminal propensity), review denied, 164 Wn.2d 1012 (2008).

In this case, evidence of the Martins’ relationship was not offered to prove that Eddie Martin acted in conformity with his prior conduct on the night of the shooting. There does not seem to be any dispute that the Martins argued when Eddie Martin revealed he had been having an affair, that Martin reacted by throwing things, or that Eddie Martin grabbed her wrist when she picked up a knife. Rather, the evidence was offered to explain Martin’s reaction to learning of her husband’s infidelity and his

desire to end their marriage. As in Grant, Eddie Martin's prior conduct was relevant for its effect on Martin's behavior, and expert testimony explaining this effect should have been admitted under ER 404(b).

Brown concluded that Martin's histrionic personality disorder, coupled with her depression and the stress of learning that her husband was having an affair and wanted a divorce, caused her to experience a dissociative episode. 21RP 1125-26. During that episode, she was unable to form the intent to kill or injure her husband. 21RP 1140. Brown explained that while learning of a spouse's infidelity would not normally trigger a dissociative episode, because of Martin's histrionic personality disorder, that event was an intolerable stressor leading to the separation of conscious will from behavior. 21RP 1126-27. It was vital to the diminished capacity defense that the jury understand why the events on the night of the shooting would trigger a dissociative reaction. Martin's description of specific incidents within the marriage, rather than just general statements about her perception of the relationship, would lend credibility to the expert's opinion.

The State conceded that Martin's statements were not hearsay, because they were made for the purpose of diagnosis or treatment. 21RP 1058; ER 803(a)(4). Under ER 705, evidence which is relied on by an expert and which is otherwise admissible is substantive evidence. K.

Tegland, 5B Washington Practice, Evidence, § § 705.4-705.5 (2007). Even if Martin's statements were inadmissible hearsay, however, they should not have been excluded. The evidence rules permit experts to rely on inadmissible evidence in forming their opinions and to recount that evidence to the jury, as long as the evidence is of a type reasonably relied upon by experts in the field in forming their opinions. ER 703; ER 705. The evidence is admitted not as substantive evidence but to explain the basis for the expert's opinion. When a psychologist expert testifies in support of a diminished capacity defense, he or she may recount the out-of-court statements the defendant made during the mental health evaluation, if the expert relied upon those statements in forming an opinion. State v. Eaton, 30 Wn. App. 288, 294, 633 P.2d 921 (1981).

Regardless of whether Martin's statements were admitted as substantive evidence or as the basis for Brown's opinion, the fact that Martin described these specific incidents rather than just claiming the relationship was volatile adds weight to Brown's conclusion that Martin suffered a mental disorder which caused a dissociative episode in which she was unable to form the necessary intent.

The court's improper exclusion of this relevant evidence denied Martin her right to present a complete defense. This constitutional error is presumed prejudicial unless the State proves beyond a reasonable doubt

that it was harmless. Maupin, 128 Wn.2d at 928-29. The State cannot meet its burden here.

The State challenged Brown's diagnosis of histrionic personality disorder, arguing that Brown had insufficient evidence to support her opinion. 22RP 1223; 23RP 1294. The prosecutor argued that learning of a spouse's infidelity would be a stressful event for anyone, and like many other people, Martin had responded in violence. He argued that the situation was not so stressful as to trigger a break with reality necessary to support a diminished capacity defense, however, and that Brown was merely speculating that a histrionic personality disorder led to Martin's dissociation. 23RP 1293, 1296.

Because the court limited Brown's testimony regarding the basis for her diagnosis, the jury was missing crucial evidence by which to assess the credibility of her opinion. Had the jury heard the excluded evidence, it could reasonably have rejected the State's argument that Brown's diagnosis was pure speculation and returned a different verdict. The State cannot prove that the court's error was harmless beyond a reasonable doubt, and Martin is entitled to a new trial.

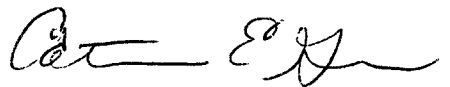
D. CONCLUSION

Because the warrant affidavit did not establish probable cause, evidence seized from the home and the shop should have been suppressed.

In addition, the court's exclusion of evidence regarding Betrayal Trauma Theory and Martin's statements about her relationship with her husband denied her the right to present a complete defense. Martin's conviction should be reversed and the case remanded for a new trial.

DATED this 1st day of June, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Appendix A

IN THE DISTRICT COURT OF CLARK COUNTY
STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff,

AFFIDAVIT FOR
SEARCH WARRANT

Vs.

SHERYL J. MARTEN
~~John Doe~~
DOB 01-30-1956

STATE OF WASHINGTON)
COUNTY OF CLARK)ss

I, Detective John O'Mara, of the Clark County Sheriff's Department Major Crimes Unit, being first duly sworn upon oath, hereby deposes and say, that I have good and sufficient reason to believe that the following described goods to wit:

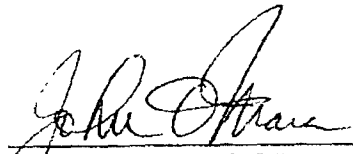
28 GAUGE SHOTGUN, SPENT AND LIVE SHOTGUN SHELLS, AN
ADDITIONAL SHOTGUN AND OTHER ITEMS THAT ARE
EVIDENCE OF THE CRIME OF ASSAULT I, RCW 9A.36.011(1)(a)

And I am aware of the same based upon the following:

I am a Detective with the Clark County Sheriff's Department Major Crimes Unit. I have been with Clark County for 8 years and have a total of 21 years Law Enforcement experience, including prior training in investigations to include Arson, Burglary, Theft, Homicide, and other crimes.

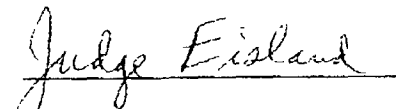
In this official capacity, I, Detective John O'Mara, was asked by Detective Sgt. David Trimble to assist with an investigation of a ASSAULT I at 1302 NE 30th Ave, Ridgefield, Clark County, Washington. Upon my arrival at the residence I met with DEPUTY JEREMY KOCH #4263 who told me the following: THAT HE WAS DISPATCHED WITH OTHER UNITS TO THE LISTED ADDRESS DUE TO A 911 CALL FROM A PERSON LATER IDENTIFIED AS SUSPECT/DEFENDANT SHERYL J. MARTEN, WHO TOLD 911 DISPATCH THAT SHE (SHERYL MARTEN) HAD JUST SHOT HER HUSBAND. RESPONDING UNITS ARRIVED, TAKING SHERYL MARTEN INTO CUSTODY, AT WHICH TIME SHE WAS READ HER RIGHTS UNDER MIRANDA AND VERBALLY ACKNOWLEDGED THAT SHE UNDERSTOOD THE RIGHTS READ TO HER. DEPUTY KOCH, ALONG WITH OTHER OFFICERS, COULD HEAR SOMEONE YELLING FROM INSIDE A CAMPER THAT WAS ATTACHED TO A WAREHOUSE PICK UP THAT WAS PARKED ON THE PROPERTY IN FRONT OF A SHOP WITH TWO OVERHEAD GARAGE DOORS.

THE ~~CAMPER~~ HAD WA. LIC. # A66337Z ON THE FRONT AND THE CAMPER A
WA. LIC. # 7704TC ON THE BACK, UPON ENTERING THE CAMPER, DEPUTY KOCH
TOLD ME HE SAW A SHOTGUN "WAD" ABOUT 2-3 FT INSIDE THE CAMPER DOOR AND TO
THE RIGHT OF THE DOOR HE SAW WHAT APPEARED TO BE A PIECE OF BUSH SHOT, NOT
IF IT HAD STRUCK SOMETHING. DEPUTY KOCH SAID HE YELLED SOMETHING LIKE "YOU
IN HERE" OR "ARE YOU OK"? A MALE, LATER IDENTIFIED AS THE VICTIM
EDDIE E. MARTIN, DOB 04-17-1956, ANSWERED "YES". WHEN ASKED WHAT THAT
EDDIE MARTIN REPLIED "MY WIFE SHOT ME". DEPUTY KOCH TOLD ME HE COULD
SEE EDDIE MARTIN IN THE BED PORTION OF THE CAMPER THAT IS LOCATED DIRECTLY
OVER THE CAB OF THE PICKUP TRUCK. MARTIN'S FEET WERE CLOSEST TO DEPUTY
KOCH, WHICH WOULD BE NORTH, AND MARTIN'S HEAD WAS NEAR THE END OF
CAMPER, WHICH WOULD BE SOUTH. DEPUTY KOCH STATED HE COULD SEE WHAT LOOKED
LIKE BLOOD ON MARTIN'S RIGHT SHIN. IN ADDITION MARTIN'S LEFT ELBOW APPEARED
TO BE "BLOWN TO PIECES AND LOOKED LIKE PIECES OF TOWEL OR BLANKET OR
PILLOW CASE WERE EMBEDDED IN THE WOUND." A SEARCH FOR ANY ADDITIONAL
PEOPLE OR SUSPECTS ON SCENE REVEALED A SHOTGUN LOCATED IN THE KITCHEN
OF THE MAIN RESIDENCE, LYING ON A CENTER ISLAND, WITH 2 LIVE SHOTGUN
SHELLS LYING NEXT TO IT. ANOTHER SHOTGUN WAS FOUND UPSTAIRS WITH THE
BREACH OPEN & A BOX OF SHELLS SITTING NEXT TO IT. IN ADDITION, DEPUTY KOCH
SAID WHILE THE DEFENDANT WAS SEATED IN HIS CAR HE NOTICED HER HEAD WAS SHAKING
AND SHE SEEMED LETHARGIC. WHEN ASKED IF SHE HAD TAKEN ANYTHING SHE TOLD KOCH "I
HAD A VODKA & A BEER," KOCH SAID "I JUST ASKED BECAUSE YOU COULD HAVE BEEN OUT OF
YOUR MIND." MARTIN REPLIED "THAT'S BECAUSE I JUST SHOT MY HUSBAND. I FOUND OUT HE'S BEEN HAVING
AFFAIRS." Based on the foregoing, I pray the court for the issuance of a search warrant for the afore-
said two years, described residence and the two vehicles parked in the driveway, to include curtilage.



Detective John O'Mara
Clark County Sheriff's Office

Subscribed and sworn to me this 08TH day of SEPTEMBER, 2007



District Court Judge
Clark County
State of Washington

Time approved: 659 hrs 9-8-07
Clark County Sheriff's case #S07-13256

Certification of Service by Mail

Today I delivered copies of the Brief of Appellant in *State v Sheryl Jean*

Martin, Cause No. 41588-7-II as follows:

Anne Cruser
Clark County Prosecuting
Attorney
PO Box 5000
Vancouver, WA 98666

Via U.S. Mail to
Sheryl J. Martin, DOC# 345252
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
June 1, 2011

COPIED BY
11 JUN -2 AM 11:27
STATE OF WASHINGTON
BY _____
DEPUTY

Catherine E. Glinski
Attorney at Law
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Manchester, WA 98353
(360) 876-2736